

7 Compliance Board Opinions 30 (2010)

Minutes – Public Access – While Open Meetings Act grants the public a right to review minutes of a public meeting, a right to copies governed by Public Information Act rather than Open Meetings Act

Closed Session Procedures – Written Statement – Right to copies of statements prepared in connection with prior meetings governed by Public Information Act rather than the Open Meetings Act

June 8, 2010

Craig O'Donnell
Kent County News

The Open Meetings Compliance Board has considered your complaint on behalf of the *Kent County News* alleging that the Maryland Transportation Authority violated the Open Meetings Act by failing to provide you with copies of certain documents that a public body is required to maintain under the Act.

For the reasons explained below, we find that the Authority violated the Open Meetings Act in that copies of written closing statements were not maintained in a manner in which the body could offer access as required under the Act. However, a failure to provide copies does not violate the Open Meetings Act. While the Open Meetings Act grants the public a right to review certain documents at the office of the public body during normal business hours, the right to obtain copies of such material would be governed by the Public Information Act – not the Open Meetings Act.

I

Complaint & Response; Supplemental Record

According to your initial complaint, on November 27, 2009, you requested from the Authority copies of minutes and written statements prepared in the closing of certain meetings. On December 3, you received copies of minutes. Apparently based on your review of those documents, you identified 19

occasions on which meetings were closed during 2008 and 2009. After further discussions with an Authority staff member, you were provided with three closing statements, two of which corresponded to minutes you had received earlier, and one closing statement, dated January 10, 2008, for which no corresponding publicly-available minutes were provided. You again contacted staff of the Authority on December 10, 2010, but as of December 14, the date of your complaint, you had not heard further from the Authority. You noted that “[p]erhaps the closing statements don’t exist.” In summary, you alleged that the Authority violated the Act by failing to provide copies of 17 of the 19 written closing statements after more than two weeks and failing to provide all minutes for 2008 and 2009.

On December 15, 2009, you submitted an addendum to your complaint stating that the Authority “through its press office, concede[d] that it violated minutes requirements and closed session requirements on multiple occasions.” Copies of some of the relevant closing statements, but not all, were forwarded to you. While you acknowledged the Authority’s willingness to modify its procedures, you indicated that you were not willing to withdraw the complaint.

In a timely response on behalf of the Authority, Assistant Attorney General Sherita Harrison addressed in detail the history of correspondence between you and Authority staff in this matter. In addressing the allegations in the complaint, the Authority’s responded that it had no duty under the Act to provide copies of the written statements or minutes within a two week time frame via e-mail or fax. While Authority staff indicated that you could view copies in the office of the Authority during normal business hours, you indicated you wanted copies sent electronically. The Authority did provide copies electronically to you on several occasions and offered to send additional materials as they were compiled.

The Authority further argued that the Open Meetings Act only requires a public body to maintain minutes and written closing statements for a period of one year. To the extent documents were requested for a period extending more than a year before the date of the request, the complaint is “unsubstantiated.” Furthermore, the Authority pointed out that the Act sets forth no time frame for responding to request for copies of documents. Nevertheless, the Authority indicated that it always responded to the complainant within a reasonable period. The response acknowledged that you were informed by Authority staff that the Authority lacked closing statements for certain sessions; however, it was subsequently determined that statement was not completely accurate. Closing statements were created for each meeting; however, as of the date of

the Authority response, the staff was still searching for statements for some meetings.

Finally, the response indicated that the Authority has taken steps to ensure that documents required under the Open Meetings Act are retained in a manner that the documents will be available for public inspection.

After receiving the Authority's response, you submitted a reply in which you took issue with much of the Authority's response. Much of your reply consisted of recommendations as to how, in your view, the Authority ought to operate. To the extent your comments extended beyond the mandates of the Act, the reply went beyond the statutory role of the Compliance Board, which is to evaluate whether a public body has complied with the requirements of the Act. However, your reply also addressed matters that go to the requirements of the Act, so we offered the Authority an opportunity to address your reply. The Authority elected to stand by its initial response and stated that your reply failed to set out any additional allegations supporting a violation of the Act. We were informed that on January 26, 2010, the Authority provided you with copies of all written closing statements covering a period of one year prior to the date of your initial request.

II

Analysis

A. In General

When a public body conducts a meeting governed by the Open Meetings Act, certain documentation is required. Relevant for our purposes here, a public body must have written minutes prepared as soon as practicable following a meeting. *See* §10-509.¹ In order to constitute the body's official minutes, the minutes must be approved by the body. *5 OMCB Opinions* 14, 16 (2006). If a public body chooses to close a portion of a meeting, certain procedures must be followed under the Act before the session is actually closed. One requirement is that the presiding officer of the public body must complete a written statement giving the reason for closure, citing the statutory authority under which the session is being closed, and listing the topics that will be discussed. §10-508(d)(2)(ii).

¹ Unless otherwise noted, all statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

The Open Meetings Act provides that minutes of an open meeting are “public records and ... open to public inspection during ordinary business hours.” §10-509(d). Similarly, the Act provides that a written statement prepared in closing a meeting is “a matter of public record.” §10-508(d)(4). The Open Meetings Act requires that a copy of minutes and closing statements must be kept for at least one year after the date of the session. §§10-508(d)(5); 10-509(e).

B. Public Access

In terms of public access, we have previously held that public access to minutes of a meeting governed by the Act derives from the Act itself. *See, e.g., 6 OMCB Opinions* 187, 190 (2009).² Once approved by a public body, “minutes of an open meeting are to be available upon request during regular business hours.” *5 OMCB Opinions* 14, 16 (2006). Thus, someone wishing to review minutes of a public body’s meetings need not invoke the Public Information Act. *Id.* Similarly, we have held that the written statement prepared in closing a meeting is to be made available for the public’s review at the time a meeting is closed. *6 OMCB Opinions* 121, 124 (2009). If a copy is requested, but copying facilities are unavailable during the course of a meeting, we have suggested that a copy be provided the next business day. *Id.* Thus, a member of the public is entitled to visit the office of a public body during regular business hours and review copies of these documents.

The Act only requires a public body to maintain copies of these documents for a year following the meeting. §§10-508(d)(5); 10-509(e). However, we disagree with the Authority’s suggestion that, should a public body choose to retain copies for a longer period, the right of the public to review these documents under the Act is somehow extinguished.³

² In interpreting the Act, we have distinguished between minutes, which are required under the Act, versus recordings, the creation of which is discretionary with the public body. Although the Act requires both records be retained for at least one year, we have held that public access to recordings is governed, not by the Open Meetings Act, but by the Public Information Act, State Government Article, §10-611, *et seq.*, Annotated Code of Maryland.

³ We recognize that there may be circumstances where the requester wants records for a period exceeding a year and the custodian has transferred the records to storage. Under these circumstances, we would expect that the public body would agree to retrieve such records if still in its custody within a reasonable period.

C. Right to Copies

The public's right to review documents that a public body is required to maintain under the Act derives from the Open Meetings Act itself. However, with the exception of copies of closing statements requested during the course of a meeting - - a document that generally consists of one or two pages - - we have never held that the Open Meetings Act provides a right to demand copies of such documents, either in paper or electronic form. The Open Meetings Act simply does not address an entitlement to copies.

The provision of copies of these public records is governed by the Public Information Act. Thus, in providing copies of records that a public body is required to maintain under the Act, in our view, a public body should respond to a requester within the time frame required under the Public Information Act. In carrying out our role, we are limited to interpreting the Open Meetings Act. 6 *OMCB Opinions* 164, 169 (2009). Whether a public body provides copies in paper or electronically is a decision for the record custodian to make with advice of its counsel on the Public Information Act.

Similarly, any charge for copies of documents maintained under the Act ought to be consistent with a public body's fee schedules adopted under the Public Information Act.

D. Authority Practices

It is apparent that the Authority's method of maintaining certain documents completed under the Act was inadequate. Apparently, the relevant documents existed. However, had someone visited the Authority to review the closing statements for the relevant time period, it is obvious that the documents could not have been readily produced. However, we commend the Authority for its pledge to modify its practices to ensure future access.

The Authority did not violate the Open Meetings Act when it failed to provide electronic copies to the requester as requested. While the Open Meetings Act requires that minutes and closing statements be available during regular business hours, the Act does not require provision of copies of these documents for prior meetings. Copies of the documents ought to be made available in accordance with the manner that a public body would handle a request submitted under the Public Information Act.

III**Conclusion**

We find that the Authority violated the Open Meetings Act in that copies of written closing statements were not maintained in a manner in which the body could offer public access as required under the Act. However, the failure to provide copies electronically did not violate the Open Meetings Act. While the Open Meetings Act grants the public a right to review certain documents at the office of a public body during normal business hours, the right to obtain copies of such material would be governed by the Public Information Act - not the Open Meetings Act.

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth L. Nilson, Esquire

Courtney J. McKeldin

Julio Morales, Esquire